APPENDIX A

Nos. 05-4162, 05-4168, 05-4272 & 05-4282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant/Cross-Appellee,
v.
DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city council members, Defendants-Appellees/Cross-Appellants.

Filed April 17, 2007

OPINION

TACHA, Chief Circuit Judge.

Summum, a religious organization, filed suit under 42 U.S.C. § 1983 against Duchesne City, its mayor, and its city council members (collectively "City") for alleged violations of Summum's First Amendment free speech rights. Summum appeals the District Court's entry of summary judgment in favor of the City with respect to Summum's request for prospective injunctive relief from alleged ongoing violations of its free speech rights. The City cross-appeals the District Court's entry of summary judgment in favor of Summum with respect to Summum's request for declaratory relief and nominal damages for the City's past violations of its free speech rights. In addition, the

City cross-appeals the District Court's denial of its motion for summary judgment based on lack of standing, and both parties appeal the District Court's order awarding Summum attorneys' fees. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part, reverse in part, and remand.

I. BACKGROUND

This dispute arises from Summum's request to erect a monument of the Seven Aphorisms of Summum in a city park in Duchesne City, Utah. In September 2003, Summum sent a letter to the mayor of Duchesne City asking the City to transfer a small (10' x 11') plot of land in Roy Park to Summum for the display of its monument. Summum requested a plot of land (rather than simply seeking permission to erect its monument on public property) because, in August, the mayor had transferred a 10' x 11' plot of land in Roy Park containing a Ten Commandments monument to the Duchesne Lions Club. At the time of the transfer, the Ten Commandments monument had been displayed in Roy Park for nearly twenty-five years. In an attempt to remove the monument from public property, the mayor transferred the land to the Lions Club by quitclaim deed. The contract for the transaction cites the club's work in cleaning and beautifying the city as consideration for the transfer. Summum, in its request for a similar land transfer, asked that the City grant it the same access to public property that the City had granted the Lions Club. The City responded by letter, notifying Summum that it would grant Summum a similarly sized plot of land in Roy Park if the organization contributed the same amount of service to

the City as the Lions Club had contributed.

Construing the City's response as a denial of its request for a plot of land in Roy Park, Summum filed suit under 42 U.S.C. § 1983 in federal district court, alleging violations of its free speech rights under the First Amendment. It also alleged the City violated its rights under the Utah Constitution's Free Expression and Establishment Clauses. It sought declaratory and injunctive relief, as well as monetary damages. Both parties moved for summary judgment. At a hearing on the motions, the District Court expressed reservations about the City's land transfer to the Lions Club. In particular, it questioned whether the sale was supported by adequate consideration and was an arm's-length transaction (the mayor of the City was also president of the Lions Club). The court also noted that the City had not erected any fences, signs, or other indications of its disassociation from the plot of land and monument. After the court encouraged the parties to seek other solutions to the problem, the Lions Club transferred the plot of land back to the City by quitclaim deed, and the City sold the plot to the daughters of Irvin Cole, in whose honor the monument was originally donated. The Cole daughters paid $ 250 for the property, which they are free to use and dispose of as they wish. In addition, a white-picket fence approximately four feet high currently encircles the property, and a sign states that the City does not own the property. The City notified the District Court of the changed circumstances.

Summum argued that the City's sale of the property to the Cole daughters did not cure the violation of Summum's free speech rights. But in response to both parties' motions for summary

judgment, the District Court entered an order in favor of the City, finding that the second sale ended the City's association with the Ten Commandments monument. The court concluded that because the monument was now private speech on private property, Summum was not entitled to injunctive relief facilitating the display of its monument in the park. In a subsequent order, the District Court concluded that prior to the sale of the plot to the Cole daughters, the City was violating Summum's free speech rights; it therefore granted Summum's motion for declaratory relief and awarded it nominal damages of $ 20. Summum now appeals the District Court's denial of its request for injunctive relief. The City cross-appeals the District Court's decision regarding declaratory relief and damages, as well as the court's denial of the City's motion for summary judgment based on lack of standing. In addition, both parties appeal the District Court's order awarding attorneys' fees to Summum as a prevailing party under 42 U.S.C. § 1988.

II. DISCUSSION

A. Standing

Before we reach the merits of Summum's First Amendment claim, we first address the City's contention that Summum lacks standing to bring this claim. Our review of this legal question is de novo. *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006).

To ensure that an Article III case or controversy exists, a party asserting federal jurisdiction must establish three elements to have standing to bring a claim. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150,

1155 (10th Cir. 2006); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1255 (10th Cir. 2004). First, the party must establish an injury-in-fact by showing "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Utah Animal Rights Coal.*, 371 F.3d at 1255 (quotations omitted). Second, the party must demonstrate causation by "showing that the injury is fairly trace[able] to the challenged action of the defendant, rather than some third party not before the court." *Id.* (alteration in original) (quotations omitted). And third, the party must establish redressability by showing "that it is likely that a favorable court decision will redress the injury to the plaintiff." *Id.* (quotations omitted).

Summum claims that its First Amendment rights were violated when the City denied its request to erect a permanent monument in the park while allowing others to do so. The City maintains, however, that it removed the Ten Commandments monument from the park by selling the underlying property and that, consequently, a forum for permanent displays no longer exists in the park. Thus, the City argues, Summum has failed to establish an injury-in-fact. But the efficacy of the City's closure of the park as a forum for permanent displays is a matter of debate. And as we have cautioned, "we must not confuse standing with the merits." *Id.* at 1256; *see also Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) ("For purposes of the standing inquiry, the question is not whether the alleged injury rises to the level of a constitutional violation. That is the issue on the merits."). If Summum is correct that

the Ten Commandments monument is part of a public forum to which it was denied access, it may have suffered a deprivation of its free speech rights, which would clearly be an injury-in-fact caused by the City's actions and redressable by a favorable court decision. We therefore conclude that Summum has standing to bring its First Amendment claim.

B. First Amendment Claim

We review a district court's grant of summary judgment de novo, applying the same standard the district court applied. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1120 (10th Cir. 2002); *see also Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004) ("On cross-motions for summary judgment, our review of the summary judgment record is de novo and we must view the inferences to be drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail . . . ."). Summary judgment is proper only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, because the case before us involves First Amendment interests, "we have an obligation to conduct an independent review of the record and to examine constitutional facts and conclusions of law de novo." *First Unitarian Church*, 308 F.3d at 1120.

1. Principles of Forum Analysis

According to Summum, because the City has

permitted a private party to erect a monument in a public forum, but denied Summum's request to do the same, it has violated Summum's free speech rights. In other words, Summum claims that the City has denied it access to a public forum on the same terms it has granted to others. Hence, Summum's claim depends on whether the Ten Commandments monument continues to be part of the forum to which Summum seeks access (i.e., permanent displays in Roy Park), even though the City claims to have transferred the small plot of land containing the monument -- first to the Lions Club and then to the Cole daughters.

Before turning to the question of whether the Ten Commandments monument remains part of the park, we note that the park, in general, is a traditional public forum, and it is this physical setting that defines the character of the forum to which Summum seeks access. Streets and parks are "quintessential public forums," as they "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).[1] The

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[1]The City argues that the relevant forum is nonpublic in nature according to our decisions in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), and *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). But in both *City of Ogden* and *Callaghan*, the property at issue could not be characterized -- by tradition or government designation -- as a public forum. *City of Ogden*, 297 F.3d at 1002 (holding that permanent monuments on the grounds of a municipal building were a nonpublic forum); *Callaghan*, 130 F.3d at 916-17 (holding that monuments on a

characterization of the forum at issue is crucial because "the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In public forums, content-based exclusions (e.g., excluding Summum's Seven Aphorisms while allowing the Ten Commandments) are subject to strict scrutiny and will survive "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* Alternatively, the government "may impose reasonable, content-neutral time, place, and manner restrictions" on speech in public forums (e.g., excluding all permanent displays). *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).[2]

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courthouse lawn were a nonpublic forum). Conversely, in the present case, the property is a park, the kind of property which has "immemorially been held in trust for the use of the public." *Hague*, 307 U.S. at 515. The fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("Having identified the forum . . . we must decide whether it is nonpublic or public in nature."); *see also Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (holding that "permanent monuments in the city park" are a public forum).

[2]We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs have broad discretion to consider content in

The difficult question in this case is whether the small plot of land with the Ten Commandments monument remains part of a public forum (i.e., the city park) despite the City's efforts to sell it to a private party. As a general matter, "[a] government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status." *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) (finding that the city had sufficiently altered former public street so that it was no longer a traditional public forum). Hence, a city's sale of public property may cause it to lose its public forum status. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) (rejecting the argument that "a public forum may never be sold to a private entity, or that if it is sold, it remains a public forum"); *see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use."). But

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making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron. Because the Supreme Court has not extended the reasoning of these cases to the context we consider today, we conclude that the case is best resolved through the application of established forum principles.

a sale of property is not conclusive. Indeed, a First Amendment forum analysis may apply even when the government does not own the property at issue: "forum analysis does not require the existence of government property at all." *First Unitarian Church*, 308 F.3d at 1122; *see also Marsh v. State of Alabama*, 326 U.S. 501, 509 (1946) (holding that the First Amendment was violated when a corporate-owned municipality restricted individual's speech); *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 452-53 (6th Cir. 2004) (holding that privately owned sidewalk surrounding privately owned park was a public forum). Thus, even assuming the property with the Ten Commandments monument is privately owned, it may nevertheless continue to be part of the public forum and therefore subject to the strictures of the First Amendment. *See First Unitarian Church*, 308 F.3d at 1131 (holding that the city's easement over private property was a public forum).

In determining whether private property retains its status as part of a public forum, the inquiry centers on the objective, physical characteristics of the property. *Utah Gospel Mission*, 425 F.3d at 1256; *First Unitarian Church*, 308 F.3d at 1124; *see also United Church of Christ*, 383 F.3d at 452 (holding that privately owned sidewalk was public forum because it resembled public sidewalk and "blend[ed] into the urban grid"); *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001) (holding that privately owned sidewalk was a traditional public forum because it was "seamlessly connected to public sidewalks at either end and intended for general public use"). That is, a city's intentions and efforts to remove the plot of land by

transferring it to private owners do not dictate the property's status. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998); *see also First Unitarian Church*, 308 F.3d at 1124 ("The government cannot simply declare the First Amendment status of property regardless of its nature or its public use."). In addition to examining the objective, physical characteristics of private property, we have also asked whether the city is "inextricably intertwined with the ongoing operations" of the private owner or property and whether the property continues to serve the same primary function as it did before the transfer. *Utah Gospel Mission*, 425 F.3d at 1256-58; *see also First Unitarian Church*, 308 F.3d at 1128 (finding the fact that easement served same purpose as public sidewalk "a persuasive indication that the easement is a traditional public forum").

The District Court did not conduct a forum analysis to determine whether the plot of land with the Ten Commandments monument remained part of the public forum (i.e., the park) despite its sale to a private party. Instead, the court analogized the present case to the facts in *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), which involved an Establishment Clause challenge to a statue of Christ in a city park. In an effort to distance itself from religious speech, the city sold the plot of land containing the statue to a private entity. The Seventh Circuit held that the city failed to take sufficient measures to end its endorsement of religion: the "physical state of the park" was such that "a reasonable person [could] conclude that the government, rather than a private entity, *endorses* religion." *Id.* at 495 (emphasis added).

But a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum. The Seventh Circuit recognized this distinction in *Marshfield* when it acknowledged that, in remedying its Establishment Clause violation, the city should be mindful of the property's inclusion in a public forum: "because our holding limits private speech in a public forum, any remedy must be narrowly tailored to avoid an Establishment Clause violation." *Id.* at 497. In other words, the court recognized that a remedy ending the city's endorsement of religion would not necessarily remove the statue from the public forum, and as part of a public forum, the statue was protected speech under the Free Speech Clause of the First Amendment. To be sure, measures a city takes to differentiate private property from a public forum might affect both the private property's status as a public forum, as well as any perceived endorsement of religion, *see id.*, but the inquiry is not identical. A surrounding fence and disclaimer may be sufficient to disassociate the City from private speech for purposes of the Establishment Clause, but these measures do not necessarily remove a small parcel of property from a public forum. The District Court therefore erred in relying on *Marshfield* to support its conclusion that the sign and fence surrounding the plot of land "removed" the plot from the public forum.

In addition to its reliance on *Marshfield*, the District Court's analysis is flawed in another respect. The first step in determining whether private property is nevertheless part of a public forum should be to resolve conclusively whether the property at issue is in fact privately owned. Because the District Court

analyzed the property's status under the Establishment Clause, rather than the Free Speech Clause, it did not focus on the City's transfer of the property to the Lions Club and, later, to the Cole daughters. Instead, the District Court assumed that both sales were valid. For Establishment Clause purposes, the property's status as private or public may not significantly affect the relevant inquiry into whether a reasonable person could conclude that the government is endorsing religion. In the context of free speech, however, whether the property is private or public significantly affects the analysis of the property's forum status. If the land transfers in this case are invalid, the Ten Commandments monument is located on public property in a city park and is therefore clearly located within a public forum. Alternatively, if the City's transfers are valid, the reviewing court must determine whether the plot of land with the monument continues to be part of a public forum despite its private ownership (and the City's efforts to disassociate itself from the monument). To apply the latter analysis without first determining the validity of the land transfers could run afoul of the fundamental principle that courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 192 (2003) (quotations omitted); *see also United States v. Cusumano*, 83 F.3d 1247, 1250-51 (10th Cir. 1996) (noting that the federal courts will not resolve a constitutional question until it is unavoidable).

The District Court should therefore have analyzed the transfers for compliance with state law, rather

than assuming that both sales were valid. We therefore conduct an independent review of the record to determine whether each transfer is valid under state law. We conclude that the transfer to the Lions Club was invalid, but find the record insufficiently developed to determine whether the sale to the Cole daughters is valid and therefore remand to the District Court so that it may conduct an analysis consistent with this opinion.

2. State Law Governing the City's Transfer of Public Property

Under state law, a city's legislative body has the power to dispose of public property "for the benefit of the municipality." Utah Code Ann. § 10-8-2(1)(a)(iii). The Utah Supreme Court has interpreted this statutory provision to require that municipalities sell or otherwise dispose of public property "in good faith and for an adequate consideration." *Sears v. Ogden City*, 533 P.2d 118, 119 (Utah 1975) (holding that a city may not dispose of its property by gift), *aff'd on rehearing*, 537 P.2d 1029. The court has also held that "adequate consideration" requires the receipt of a "present benefit that reflects the fair market value" of the property. *Mun. Bldg. Auth. of Iron County v. Lowder*, 711 P.2d 273, 282 (Utah 1985); *see also Salt Lake County Comm'n v. Salt Lake County Attorney*, 985 P.2d 899, 910 (Utah 1999) (holding that adequate consideration requires a specific benefit stated in "present market value terms"). Hence, a "future" benefit will not supply adequate consideration for a city's transfer of property, "nor will a benefit that is of uncertain value." *Price Dev. Co., L.P. v. Orem City*, 995

P.2d 1237, 1247 (Utah 2000). Furthermore, Utah case law suggests that a city's disposal of park property is subject to additional limitations: "[P]roperty such as streets, alleys, parks, public buildings, and the like, although the title is in the city . . . is held in trust for strictly corporate purposes, and, as a general rule, cannot be sold or disposed of so long as it is being used for the purposes for which it was acquired." *McDonald v. Price*, 45 Utah 464, 146 P. 550, 551 (Utah 1915).

In addition to these substantive requirements, the Utah Supreme Court has held that a city's transfer of public property must be supported by documentation demonstrating the fairness of the transfer:

> [W]hen a legislative body enters into a transaction where public money or property is given in exchange for something, the good faith legislative judgment that the net exchange is for fair market value flowing to the entity needs to be supported by documentation within the legislative record of an independent determination of the value of the exchange.

Price Dev. Co., 995 P.2d at 1249. Such documentation attaches a presumption of validity to the transaction, the strength of which is "in direct proportion to the thoroughness of the evaluation of the transaction entered into and to the independence and skill of the evaluators." *Id.*

a. Transfer of the Plot to the Lions Club

The transfer from Duchesne City to the Lions Club by quitclaim deed in August 2003 was clearly invalid under state law. As an initial matter, no presumption of validity attaches to the transaction because no

documentation exists demonstrating the transaction's fairness. The City contends, however, that the properly executed and recorded quitclaim deed creates a presumption of validity. The City is correct that, under Utah law, recorded documents governing title to real property do create certain presumptions, Utah Code Ann. §§ 57-1-13; 57-4a-4, including the presumption that "any necessary consideration was given," *id.* § 57-4a-4(1)(e). But this more general statute must be interpreted in conjunction with the specific statutes and case law governing transfers of real property by municipalities. And, as noted above, a municipality's transfer of public property enjoys a presumption of validity only when supported by underlying documentation of the "independent determination of the value of the exchange." *Price Dev. Co.*, 995 P.2d at 1249.

Moreover, the presumption of a valid transaction may be rebutted by clear and convincing evidence of the transfer's invalidity. *Gold Oil Land Dev. Corp. v. Davis*, 611 P.2d 711, 712 (Utah 1980). In this case, the record contains clear and convincing evidence that the City's transfer to the Lions Club was invalid. The deed purported to transfer the parcel of property from the City to the Lions Club in return for $10 and "other considerations." The contract for sale of the property states that the transfer is "in exchange for consideration of work for the cleaning and beautification of Duchesne City." Neither document supports a conclusion that the consideration is a specific, present benefit reflecting fair market value. In addition, the same person represented entities on both sides of the transaction; Clinton Park signed the contract on behalf of the City, in his capacity as mayor,

and on behalf of the Lions Club, in his capacity as president of the local chapter. This fact raises considerable doubt that the transfer was made in "good faith." *See, e.g.*, Utah Code Ann. § 70A-1-201(19) ("'Good faith' means honesty in fact in the conduct or transaction concerned."). Because the sale to the Lions Club was not made "in good faith and for an adequate consideration," *Sears*, 533 P.2d at 119, it is invalid under state law.

Because the sale to the Lions Club was invalid, the plot of land with the Ten Commandments monument remained part of a public forum. The next question is whether the City's reasons for prohibiting Summum's speech satisfy the appropriate First Amendment standard. The City concedes it excluded Summum's speech based on its subject matter and the speaker's identity. In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public. *See Cornelius*, 473 U.S. at 808 (noting that exclusion of speech from a public forum requires "a finding of strict incompatibility between the nature of the speech or the identity of the speaker" and the forum's function); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."). To survive strict scrutiny, the City must demonstrate that "the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

The City does not assert any compelling interest

for this restriction.[3] Rather, the City asserts that no constitutional right exists to erect a permanent structure on public property. We do not need to address that proposition in its most general application, however, because in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege. Indeed, the cases cited by the City acknowledge this distinction. *See, e.g., Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("First Amendment jurisprudence certainly does mandate that if the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations . . . ."); *see also Summum v. Pleasant Grove City*, __ F.3d __ (10th Cir. 2007) (holding that a content-based exclusion of a permanent display in a public park violated the First Amendment). Indeed, we have held that similar

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[3]In its letter denying Summum's request, the City indicated it would grant Summum the same access as the Lions Club once Summum contributed the same number of service hours to the City. While we doubt the sincerity of the City's stated reason (and therefore its motive) in excluding Summum's speech, the City's denial based on lack of community service confers too much discretion on city officials to exclude speech from a public forum. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770-72 (1988). The City provided no specific guidelines for determining when a speaker has engaged in the quantity and quality of community service sufficient to gain access to the park. This kind of "unbridled discretion" is clearly unconstitutional. *Id.* at 770 ("The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.")

restrictions on speech may violate the First Amendment even under the less exacting standard of review applied to speech restrictions in nonpublic forums.[4] *Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906, 921 (10th Cir. 1997). Viewing the relevant, undisputed facts in the light most favorable to the City, we therefore conclude that Summum's free speech rights were violated prior to the property's transfer to the Cole daughters and affirm the District Court's grant of summary judgment in favor of Summum on this issue.[5]

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[4]Moreover, because the Ten Commandments monument remained part of a public forum, we need not address the City's argument that the display of Summum's monument (and no other) would have caused the City to violate the Establishment Clause. But we note that, when a forum for private speech exists, we have rejected the Establishment Clause defense. *Callaghan*, 130 F.3d at 921; *see also City of Ogden*, 297 F.3d at 1011 (recommending that the city post a disclaimer if it is concerned that reasonable observers would interpret monument as a governmental endorsement of religion).

[5]The City argues that the District Court should not have granted Summum's request for declaratory relief because it had already granted the City's motion for summary judgment on Summum's entire First Amendment claim. But in its order, the court found that the City's sale to the Cole daughters cured any First Amendment violation and denied Summum's request for *prospective* relief in the form of an injunction. The court specifically noted that the order did not settle Summum's claims for money damages and attorneys' fees. This first judgment did not therefore preclude the court's subsequent entry of declaratory judgment and damages in favor of Summum for the period prior to the City's second attempt to transfer the property. Furthermore, although declaratory relief is typically prospective, "we consider declaratory relief retrospective to the extent that it

b. Transfer of the Plot to the Cole Daughters

Summum's request for prospective injunctive relief depends, in part, on the validity of the City's transfer of the property to the Cole daughters. After Clinton Park, in his capacity as president of the Lions Club, transferred the property back to the City, the city council passed ordinances governing the disposition of real property owned by the City and vacating the 10' x 11' parcel of property with the Ten Commandments monument. The council also passed a resolution authorizing the mayor to transfer the property to the Cole daughters. In July 2004, Clinton Park, as mayor, signed a quitclaim deed transferring the property to the Cole daughters for $250 "and other considerations."

The value of the exchange is apparently based on a Duchesne County tax appraisal, which lists the Duchesne Lions Club as the owner. This alone is not enough to determine whether the sale was in good faith and for adequate consideration under state law. The record lacks any supporting documentation "of an independent determination of the value of the exchange," *Price Dev. Co.*, 995 P.2d at 1249, or "a detailed showing of the benefits to be obtained" from the transfer, *Salt Lake County Comm'n*, 985 P.2d at 910. The county tax appraisal does not contain this detailed showing, as it is not intended to evaluate the City's transfer of the property to a private owner. Moreover, the record contains no discussion of whether

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is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred," *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002), even though it is "superfluous [in this case] in light of the damages claim," *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997).

the City could dispose of park property when the property's purpose had not changed. *See McDonald*, 146 P. at 551 (noting general rule that property "held in trust for strictly corporate purposes" may not "be sold or disposed of so long as it is being used for the purposes for which it was acquired").

The District Court simply assumed the sale was valid based on the City's assertions and did not conduct an analysis of the transfer under state law. But based on our review of the record, a genuine issue of material fact exists concerning the validity of the City's transfer. We therefore reverse the District Court's grant of summary judgment in favor of the City on Summum's claim for injunctive relief. Because a determination of the sale's validity is important to a determination of the property's forum status, the District Court must first decide whether the sale meets the requirements of state law. Once this issue is decided, the court may then decide the constitutional issue of the property's forum status, applying an analysis consistent with this opinion. In addition, even if the District Court determines on remand that the land upon which the Ten Commandments monument rests is no longer part of the traditional public forum of Roy Park, Summum may still be entitled to prospective injunctive relief entitling it to place its monument on other locations that remain in the traditional public forum of Roy Park, unless the court determines that the City's ordinance purporting to close all of Roy Park to permanent displays is a valid time, place, or manner restriction under the analysis articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989).

C. State Law Claims

Summum also claims that the District Court erred in dismissing its state law claims. In resolving the parties' motions for summary judgment the District Court did not explicitly address Summum's state law claims. Accordingly, we assume that it declined to exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1367(c). *See Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1155 n.6 (10th Cir. 2001) (assuming district court declined supplemental jurisdiction when it did not address state law claims in its order of dismissal). We review a district court's decision regarding supplemental jurisdiction for abuse of discretion. *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1213 (10th Cir. 2006). In general, when federal claims are disposed of prior to trial, the district court may decline to exercise supplemental jurisdiction over state law claims and allow the plaintiff to assert those claims in state court.[6] *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995); *see also* 28 U.S.C. § 1367(c)(3) ("[A] district court[] may decline to exercise supplemental jurisdiction" over state law claims if it "has dismissed all claims over which it has original jurisdiction."). But

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[6]In fact, in *Snyder v. Murray City Corp.*, we reversed a district court's decision to exercise supplemental jurisdiction over claims involving Utah's Free Exercise and Establishment Clauses when the court had resolved the federal claims prior to trial. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1354-55 (10th Cir. 1997) (noting that the complex nature of the law interpreting Utah's religion clauses supported dismissal of state claims), *vacated in part on rehearing en banc*, 159 F.3d 1227 (10th Cir. 1998).

because we remand Summum's federal claim for prospective injunctive relief, the District Court should reconsider whether to exercise supplemental jurisdiction over Summum's state law claims. *See Baca v. Sklar*, 398 F.3d 1210, 1222 n.4 (10th Cir. 2005) (directing the district court to reconsider its decision to decline supplemental jurisdiction after remanding a federal claim).

D. Attorneys' Fees

Both parties appeal the District Court's order awarding Summum one percent ($694.40) of the amount requested in attorneys' fees. Summum argues that it is entitled to a larger fee award, while the City argues that the court should not have awarded Summum any attorneys' fees. Because we reverse the District Court's grant of summary judgment in favor of the City with respect to injunctive relief, we vacate its order awarding attorneys' fees. The District Court may recalculate attorneys' fees after it determines whether Summum is entitled to injunctive relief in light of the foregoing discussion.

We caution, however, that to reach the conclusion that a plaintiff's victory is merely technical or de minimis -- justifying only a low fee award or no award at all -- the court must first apply the factors from Justice O'Connor's concurrence in *Farrar v. Hobby*, 506 U.S. 103, 116-22 (1992).[7] In this case, the District

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[7]These three factors are: "(1) the difference between the amount recovered and the damages sought, (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) the accomplishment of some public goal other than occupying the time and energy of counsel, court, and client." *Lippoldt*, 468

Court characterized the City's violation of Summum's rights as "technical" before it applied the O'Connor factors because it had only awarded Summum nominal damages. But "[n]ominal relief does not necessarily a nominal victory make." *Farrar*, 506 U.S. at 121. Accordingly, on remand, the court should apply the three O'Connor factors *before* deciding that the victory is technical and that the only reasonable fee is therefore a low fee or no fee at all. *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1230 n.3 (10th Cir. 2001); *see also Lippoldt*, 468 F.3d at 1223-24 (holding that the district court abused its discretion in finding that plaintiffs achieved only technical success without considering all the *Farrar* factors).

III. CONCLUSION

We AFFIRM the District Court's grant of summary judgment in favor of Summum with respect to declaratory relief and nominal damages, but we REVERSE its grant of summary judgment in favor of Duchesne City with respect to Summum's request for injunctive relief. In addition, we VACATE the District Court's order awarding Summum attorneys' fees and REMAND for further proceedings consistent with this opinion.

F.3d at 1222 (quotations omitted).

APPENDIX B

Case No. 2:03CV1049

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUMMUM, a corporate sole and church
Plaintiff

v.

DUCHESNE CITY, et al.
Defendants

Filed May 23, 2005

SECOND AMENDED OPINION AND ORDER

BACKGROUND

In 1979, the Cole family of Duchesne County, Utah donated a Ten Commandments stone monolith to Duchesne City.[1] The donation was made in the name and memory of Irvin Cole, a long time resident of the community. The City placed the monolith on a 10' x 11' plot of land in Roy Park (a city park located in the center of the City) where it remained undisturbed for approximately twenty-five years. The Ten Commandments monolith has now become the object of this dispute.

On August 15, 2003, Mayor Clinton Park

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[1]Duchesne City is a small Utah community situated in the northeast quadrant of the State of Utah with a population of less than 2,000 residents.

transferred the plot of land containing the monolith to the Duchesne City Lion's Club.[2] The quit claim deed, which memorialized the transfer, noted the Lion's Club's previous, current and future services to the community as consideration for the land transfer. Three weeks after the land transfer, on September 9, 2003, Summum[3] sent a letter to Duchesne City requesting a similar plot of land as that transferred to the Lion's Club. Summum desired to place its own monument containing its seven aphorisms next to the Ten Commandments monolith, claiming its monument would be similar in size and appearance. On October 4, 2003, and October 23, 2003, Summum sent additional letters to the City, each requesting that it receive a plot of land in Roy Park similar to that transferred to the Lion's Club, and that Summum be given the same treatment as the Cole Family and be allowed to erect its monument on city property in Roy Park.

On October 27, 2003, the City responded by letter to Summum's requests. In its response the City made it clear that it would not transfer land to Summum nor would it allow Summum to erect its monument in Roy Park unless and until Summum donated equal amounts of time and service to Duchesne City

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[2]The land transfer, which will be discussed in detail below, consisted of Mayor Clinton Park transferring the parcel of land to the Lion's Club in a private transaction using a Quit Claim Deed. Mayor Park is also the president of the Lion's Club.

[3]Summum is a church. Summum claims to have 250,000 members worldwide, and is headquartered in Salt Lake City, Utah, where its founder and leader, Summum Bonum Amen Ra, resides.

equivalent to that given by the Cole Family and the Lion's Club.[4] Upon receiving the City's response, Summum filed suit on November 26, 2003, alleging violations of its First Amendment Free Speech rights and its Free Speech rights pursuant to Article I, Section 15 of the Utah Constitution. Summum also alleged a violation of the state of Utah's Establishment Clause pursuant to Article I, Section 4 of the Utah Constitution.

Shortly after filing its Complaint, Summum made a Motion for a Temporary Restraining Order and Preliminary Injunction requesting the Court to enjoin the City from giving a preference to the Cole Family and the Lion's Club to present their private viewpoints in a public forum. Both Summum and the City moved for summary judgment. The Court held a hearing on the parties' motions on January 8, 2004, at which time the Court took the motions under advisement. The Court then held a status conference on February 4, 2004, at which the Court requested supplemental briefing on, among other issues, the constitutional ramifications of allowing Summum's religious monument on public property; the ability of the Lion's Club to own real property; and, assuming the land transfer to the Lion's Club was invalid, the constitutionality of allowing the City to invalidate the land transfer to the Lion's Club and then resell the

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[4]Prior to the Fall of 2003, Summum had not established any ties to Duchesne City. There are no members of the Summum religion that reside in Duchesne City, there are no places of worship nor are there any current efforts by Summum to proselytize in Duchesne City. According to the record, Summum only became aware of the Ten Commandments monolith after receiving a telephone call from someone who knew about it.

parcel of land at public auction on the condition that the purchaser place a visible barrier of demarcation and signage on the land to distinguish between public and private land.

After receiving the supplemental briefing, the Court held a status conference on May 26, 2004, at which time the Court took the supplemental briefing and all other additional motions filed by the parties under advisement. The Court also encouraged the parties to engage in settlement discussions and set July 4, 2004 as a deadline for settlement discussions. On July 4, both parties submitted a notice to the Court outlining the actions taken in an effort to settle the dispute. The City's notification alerted the Court to the fact that it had nullified the land transaction made with the Lion's Club and had then passed numerous ordinances in an attempt to remove itself from providing a limited public forum for private speech. The City first passed ordinance 04-2, which covers the disposition of city owned real property. The City then passed ordinance 04-4 in which the city council voted unanimously to vacate and sell the portion of land in Roy Park on which the Ten Commandment monolith sits and also to permanently close Roy Park as a forum for private displays. Finally, the City passed ordinance 04-3 which authorized Mayor Clinton Park to execute a quit claim deed covering the parcel of land containing the Ten Commandments monolith in favor of Rae Donna Jones, Lou Ann Larson, and Ro Jean Rowley, the daughters of Irvin Cole. Accordingly, on July 13, 2004, the City sold the property to Ms. Jones, Ms. Larson and Ms. Rowley, for the fair market value of $250.00, based on an appraisal conducted by Duchesne County. The sisters are currently in the process of

placing a fence around the parcel of land along with a sign to demarcate the boundary between public and private land.[5]

Though the conditions and facts surrounding the Ten Commandments monolith have been modified, the parties have yet to reach a settlement. Summum maintains the position that the current arrangement remains in violation of the First Amendment's Free Speech Clause, while the City contends that the recent ownership change to the parcel of land in Roy Park cures all constitutional infirmities and makes this matter moot. The Court having considered the parties' arguments issues the following Opinion and Order.

ANALYSIS

During the latter half of the 20th Century many towns and cities in the United States accepted donations displaying the Ten Commandments.[6] These monuments were often placed by the municipalities in

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[5]According to the City's counsel at oral arguments before the Court on September 15, 2004, the plans for the property call for a fence approximately 4 feet in height with a permanent sign stating that the property is the private property of the Cole family, and is not owned or maintained by Duchesne City.

[6]*City of Elkhart v. Books*, 532 U.S. 1058 (2001); *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 358 F.3d 1020 (8th Cir. 2004); *Van Orden v. Perry*, 351 F.3d 173, (5th Cir. 2003) *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, (7th Cir. 1988); and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

city parks and near courthouses.

The acceptance of these gifts and their display appears to have been generally accepted, at least without legal challenge at the time of the donations. Over time, however, numerous lawsuits challenging the displays were filed, complaining that the displays violate the Establishment Clause of the First Amendment to the United States Constitution.[7] The outcome of these Establishment Clause challenges varied from court to court and circuit to circuit.[8] In the

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[7]*City of Elkhart v. Books*, 532 U.S. 1058 (2001); *ACLU Nebraska Foundation* v. *City of Plattsmouth, Nebraska*, 358 F.3d 1020 (8th Cir. 2004); *Van Orden v. Perry*, 351 F.3d 173, (5th Cir. 2003) *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, (7th Cir. 1988); and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

[8]The United States Supreme Court has not directly addressed the issue. However, in *City of Elkhart*, an Establishment Clause case, Justice Rehnquist, joined by Justices Scalia and Thomas, made the following observation regarding the secularity of Ten Commandment displays in his dissenting opinion:

> [W]e have never determined . . . that the Commandments lack a secular application. To be sure, the Ten Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, "the religious duties of believers." (citations omitted) Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes. . . . "[T]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *City of Elkhart*, 121 S. Ct. at 2211 (citations omitted) (Rehnquist, J., dissenting).

Tenth Circuit Court of Appeals the issue was raised in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), a case that involved the donation in 1972 of a Ten Commandments monument by the Fraternal Order of the Eagles to Salt Lake City, Utah. The City accepted the donation and chose to place the monument near the front steps of the City courthouse. In its defense to the lawsuit, the City emphasized its view that the Ten Commandments represented the foundation of the laws of the United States and the State of Utah, and for that reason they had secular significance separate and apart from any religious connotations. The Tenth Circuit agreed, finding that the predominant feature of the Ten Commandments was not religious in nature, and therefore the display did not violate the Establishment Clause of the Constitution.[9]

The Nineteen Nineties saw the emergence of a

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[9]In making its determination the Tenth Circuit focused on the secular aspect of the Ten Commandments stating:

> [A]n ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character - it also has substantial secular attributes. . . . [T]he Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions. After all, we are a religious people whose institutions a Supreme Being.'" *Anderson*, 475 F.2d at 33 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

After recognizing the secular nature of the Ten Commandments the Tenth Circuit determined that the monument was no more than a depiction of a historically important event with both secular and sectarian effects leading to the holding that the monument is "primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief." *Id.* at 33.

different legal challenge to Salt Lake City's Ten Commandments display, based not on the Establishment Clause of the First Amendment but rather on the Free Speech Clause of the same amendment. In *Summum v. Callaghan,* the same plaintiff as in the instant case contended that by accepting the Ten Commandments monument and displaying it on the grounds of the courthouse, the city was permitting one actor to display its private speech, and because the city was not willing to allow the plaintiff to similarly display its religious views near the courthouse steps, the plaintiff's free speech rights were being violated. *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). The Tenth Circuit agreed, holding that the city had created a "limited public forum" and that the city was required to allow other private citizens to display their views there. Faced with this situation, the city removed the Ten Commandments monument entirely, and chose to close the area to any displays. Once the city removed the monument the case was not pursued further, and the action was dismissed.

Generally following this same rationale, although with a slightly different legal analysis, five years later the Tenth Circuit also found that the City of Ogden, Utah was similarly in violation of Summum's free speech rights in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).[10]

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[10]There, Ogden City maintained a Ten Commandments monument on the grounds of the Municipal Building. The monument was donated to the city in 1966 by the Fraternal Order of Eagles. Summum proposed that the city allow it to erect a similar monument. The City rejected Summum's proposal, which led to Summum filing a § 1983 complaint alleging violations of the

In the present case, Summum has challenged the Ten Commandments monument in Duchesne City, again basing its claim on the Free Speech Clause. As outlined above, before commencing suit Summum sought, and was denied, permission from Duchesne City to erect its own monument in Roy Park. Unlike Salt Lake City, and Ogden, and perhaps learning from their examples, Duchesne City did not respond to Summum's suit by defending its right to display the Ten Commandments monument on city property or to defend its right to have had it there in the past. Rather, the City immediately took steps to disassociate itself from the property and from the display of private expression. From the beginning of this case the City has never attempted to defend its prior actions, but it has instead attempted to properly rid itself of any association with the sponsorship of that particular expression, and to get out of the business of opening up city property to private speech by private actors.

The City's first attempt in this regard was to convey the plot of land upon which the Ten Commandments monument sits to the Duchesne Lion's Club. The city's Mayor Clinton Park took action to this effect in August of 2003, whereby he transferred the property pursuant to a Quit Claim Deed which was presented to the Lion's Club in recognition of the Club's many years of service and support to the City.

First Amendment. The Tenth Circuit held that Ogden City violated Summum's First Amendment rights by rejecting Summum's monument while displaying the Ten Commandments. The Tenth Circuit's holding prompted Ogden City to move the monument to privately owned land and to close the Municipal Building grounds to any private displays. This action by the city ended the controversy.

Summum resisted this attempt on the City's part as a proper resolution of this case, contending that the "sale" was not arms-length, that it lacked legal consideration, and that it did not sufficiently remove the City's endorsement of and involvement with the monument. It was noted by the plaintiff that there were no efforts to put up signs or other notices that would clearly state the property was no longer owned or controlled by the City.

The Court also expressed reservations about this so-called "sale" to the Lion's Club as an adequate resolution of the case, in part because the transaction appeared to lack adequate consideration and to be less than an arms-length transaction. The City's mayor was also the president of the Lion's Club, and there were virtually no efforts, such as signs, notices, or fences, to notify those who saw the monument that it was not on private property and was not sponsored by or associated with Duchesne City. Recognizing the possibility of a settlement between the parties, and in particular the City's apparent remaining desire to find an appropriate way to cease engaging in the type of free speech activity found in *Callaghan* and *City of Ogden,* the Court encouraged the parties to consider other ways of resolving the case.

Thereafter, in another effort to distance itself from the monument, the City undid the sale to the Lion's Club and instead sold the property to Rae Donna Jones, Lou Ann Larson, and Ro Jean Rowley. These women are the daughters of Irvin Cole, in whose name the Ten Commandments was originally donated to the City in 1979. According to the City, the sales price of $250.00 reflects a fair market value appraisal of the property. The transaction also includes the erection of

a fence around the property and signage which states that the property is the private property of the Cole family and is not owned by Duchesne City and that the City has nothing to do with the property or anything expressed on the property by its private owners. It is also clear the Cole daughters are free to do whatever they choose with the property, including removal of the monument.

The City's latest action is similar to a proposal advanced by the Seventh Circuit Court of Appeals in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). There a local group sought injunctive relief against the City of Marshfield, Wisconsin, because the city maintained a statue of Christ in a city park. To get out of the display business, the city sold the parcel of land containing the statue to the Henry Praschak Memorial Fund, Inc., for $21,560.00 ($3.30 a square foot).[11] The sale complied with all Wisconsin statutory requirements for the disposition of real property.

In resolving the case, the Seventh Circuit determined that the city's sale of its property containing the statue was not government action endorsing religion and was a reasonable method of removing itself from promoting religious speech. However, the Seventh Circuit determined that the city failed to sufficiently remove itself from the perception that the statue was still part of a public forum and therefore found a violation of the Establishment

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[11]The sale complied with all Wisconsin statutory requirements and the amount received was the highest price per square foot that the City has received for a sale of its land.

Clause.[12] The Seventh Circuit went on, however, to suggest an alternative to the City of Marshfield to eliminate the Establishment Clause problem stating:

> should the City (on City property) construct some defining structure, such as a permanent gated fence or wall, to separate City property from Fund property accompanied by a clearly visible disclaimer, on City property,(citations omitted) we doubt that a reasonable person would confuse speech made on Fund property with expressive endorsement made by the City. *City of Marshfield*, 203 F.3d at 497

Summum contends this latest effort by the City is not an adequate resolution of this lawsuit. Summum insists on being allowed its own plot of city property upon the same terms as were provided to the Ten Commandments monument donated by the Cole Family. Anything less than this remedy is not satisfactory to Summum.[13]

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[12]The language used by the 7th Circuit is as follows:
The sale transferred the statue from City ownership to private ownership, and the Fund, a purely private entity, is responsible for any expression inferred from the statue. Had the sale of the property been conducted in such a manner as to remove the impression that the statue remained part of the public forum, there would be no question that the city ended its Establishment Clause troubles. *City of Marshfield*, 203 F.3d at 496.

[13]Summum's argument is as follows:
Summum desires-equal access to the forum. Summum seeks to be treated like the Coles were before 2003, like the Lion's Club was in 2003 and 2004, and now as the Cole heirs are being treated. Defendant's maneuvering does not support free speech, the exercise of religion, nor a constitutional display of religious monuments. Rather, defendants simply support the

Considering all of the circumstances, including the lengthy history of the monument in this case, this Court agrees generally with the reasoning of the Seventh Circuit in *City of Marshfield* and finds that Duchesne City's recent efforts to disassociate itself from further involvement with the Ten Commandments monument are sufficient, with the exception of money damages to which Summum may be entitled, to render moot the present action. Duchesne City has undertaken adequate actions to make it clear that the monument sits on property that is neither owned nor controlled by the city, and that nothing on the property is in any way endorsed by or associated with Duchesne City. No reasonable person upon visiting the area could believe the city is presently sponsoring whatever expression is reflected on the plot owned by the Cole daughters. Indeed, the decision whether to continue to keep the monument on the property is solely within the discretion of the women who now own the property. They are free to use their property as they desire.

The Court's decision is based not on a determination that the City's actions necessarily constitute the best possible solution to the problem (opinions on what is "best" will in any event vary depending on one's point of view), but on whether it is a constitutionally adequate method for the City to disassociate itself from any present sponsorship of free speech activity.

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permanent display of only one set of religious ideals in a location especially created for that unconstitutional purpose. Plaintiffs Response to Defendant's Notice of "Changed Circumstances," pgs. 5-6.

There are no perfect solutions in a case of this nature with its unique history and its unique facts. It is obviously impossible for the City to undo its past involvement with the monument. For the majority of the past 25-plus years, the City apparently felt that it had properly (legally) accepted a gift from a long-term resident family and properly displayed the gift in Roy Park without violating any laws. As noted above, in 1979 it became the clearly established law in this circuit that Salt Lake City's display of a similar Ten Commandments monument did not violate the Establishment Clause. When confronted with the present lawsuit in 2004, as explained above, the City chose not to defend its prior actions, but rather to disassociate itself from them. Under all of the circumstances the method the City recently undertook is reasonable. Summum's demands for a different resolution are not warranted. It is not necessary for the City to do more than it has done to appropriately remove itself from improperly sponsoring the Ten Commandments as someone else's private speech. The City has effectively communicated to the public that it is not sponsoring the speech and has turned the matter entirely over to private actors. Complete dismantling or removal of the monument, as occurred in Salt Lake City, although also a sufficient solution, is neither required nor requested by plaintiff. Indeed, even complete removal of the monument may not satisfy this plaintiff, or any other similarly situated plaintiff. It is not beyond the realm of possibility that a plaintiff may insist that to make things right in these circumstances the plaintiff must be allowed to a) have the city accept the plaintiff's donation, b) install it in Roy Park, Duchesne City, c) for 29 years, and d) at the

end of that period, sell the plot of land to the plaintiff for fair market value, and e) then allow the plaintiff to do whatever it wants with the land and the monument. Or another plaintiff may demand something entirely different, such as removal of the present monument, and the installation of its own monument in the city park with permission to remain there for 29 years, at the conclusion of which the plaintiff's monument would be likewise removed and destroyed. Another plaintiff may not be content with any of these possibilities.

Summum's request for its own monument to be displayed in Roy Park, either on city-owned land, or public property sold to it, would only perpetuate the City's entanglement with the sponsorship of private expression activities of private parties as defined in *Callaghan* and *City of Ogden*. Any solution of that nature would open the door to another display and then another, and so on, until the city park looks like a NASCAR driver at the Brickyard 400.

Based on the Court's finding that the City's actions in removing itself from sponsorship of the Ten Commandments monument are adequate to remove the City from further sponsorship of private expression, the Court denies to plaintiff the specific injunction remedy it seeks. Plaintiff's Motion for Summary Judgment is DENIED. Defendant's Motion for Summary Judgment is GRANTED.

The only remaining issues are plaintiff's claims for money damages and attorneys fees.

IT IS SO ORDERED.

Dated this 20th day of May, 2005

By the Court

/s/_____
Dee Benson
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

SUMMUM, a corporate sole and church,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 2:03-CV-1049DB
	)	
DUCHESNE CITY,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE DEE BENSON

April 28, 2005

Motion Hearing

[16] * * *

THE COURT: Okay. The way I see it is simply this. [17] It may be appropriate for me to ask you to do one additional brief in this case, and I apologize in advance, if that is what we end up doing. I had in the past, I think, clearly, at least I know from my point, since I am not clairvoyant, but I have found a problem in terms of the constitutional adequacy of the City of

Duchesne's efforts to get out of the business of providing a public or non-public forum, public forum, limited use public forum, whatever you want to call it, for the purpose of private actors to express themselves.

I am guided by the two decisions by the Tenth Circuit, Callaghan, which was my own case, and I know it only too well, and the City of Ogden case. Those cases laid down clear guidelines and a clear legal analysis for the free speech issue brought in those cases. It was brought by Summum in both cases, and in both cases, as we all know, the Tenth Circuit ruled in favor of Summum and found that Summum's free speech rights had been violated, regardless of the fences thrown up by the City of Salt Lake in the Callaghan case, or by the City of Ogden in the Ogden case. As we all know, there were a lot of them and there were reasons why this was not an appropriate use of government property and to accept the donation and all of that.

The Tenth Circuit said, no, what you have created in Callaghan is they find something called a limited use non-public forum or limited use public forum, I thought it was [18] limited use public forum, it was one of the two, and they championed it as a new term of art in this developing case law regarding the free speech clause, not to mention that it reversed yours truly. But they disregarded the defenses as valid legal defenses by the City of Salt Lake and said, no, under these circumstances you have violated Summum's free speech rights, and left the clear impression, I think, that if you don't do something about it, and you have got two choices, you can either give Summum an equal opportunity to display its monolith, or you can remove the one that you have got there, which is what the City

of Salt Lake did.

In Ogden the legal analysis was slightly different, but it reached the same result. You are violating Summum's free speech rights, and the City of Ogden decided to transfer the monument, as I understand it, to non-city property and away from city hall where it was located, or wherever it was displayed.

In light of those cases I would be inclined to find clearly that the City of Duchesne was in violation of Summum's free speech rights right up until it transferred the property to the Lion's Club. Clearly, I guess on that we would all have to agree. If Summum had made its request for a marker similar to the way they made it in Salt Lake, and similar to the way they made it in Ogden, and the city tried to defend itself by saying we have every right to have this monument here [19] and it is not violating your free speech rights, they would have lost.

When this case came to me we were in the interesting situation where the city had already done something to attempt to get the monument off of public property and get it onto private property with a private actor owning the property and entitled to do whatever it wanted to do with what was formerly public property.

I was inclined, as I said in my written opinion, to agree generally with the reasoning with the City of Marshfield case out of the Seventh Circuit. In that case the issue was not free speech, and that I think is important to note. It was not free speech, it was whether the establishment clause was being violated by a statute of Jesus Christ in a city park. The Seventh Circuit held that an effort on the city's part, as you know, to transfer that to a private owner was not

enough to eliminate the establishment clause violation. They did, however, in dictum in their opinion state that if there had been enough signage around the monument and enough demarcation so that no reasonable observer would believe that the statute still sat on public property or was endorsed by the city, then it would be an appropriate way for the city to stop violating this establishment clause. That later happened. I believe that was the end of the case.

In this case I suggested, in my efforts to get this [20] settled, that the city had problems with its current situation, in which the land transfer was only between the mayor and himself wearing two different hats, and where there was some issue as to whether it was a valid state transfer, in any event.

Thirdly, that there was some issue as to whether there was sufficient consideration paid. Fourthly, and probably most important from my standpoint, is that there were no apparent efforts taken to tell a reasonable passerby, a reasonable observer, that the city was not an endorser of and participant in this display. There was no signage. There was no fence. There was no flashing neon sign saying this is the property of the Lion's Club in Duchesne City, and the City of Duchesne has no involvement or anything of that nature.

I tried to suggest that maybe this can go away because it looks like the city has already started down this road. I'm suggesting they have not gone far enough. And then when the city did go the next step, I found that it was far enough. So the issue as to whether Mr. Barnard's client has prevailed centers solely on whether Summum's free speech rights were violated during the time that the conditions existed

where the city had transferred the property to the Lion's Club. I see a possible distinction between the establishment clause, which is a different kind of right than a free speech right. A free speech right gives the free speech right to a citizen to [21] exercise freedom of expression. The establishment class prevents the government from doing anything to establish a certain religion. In the City of Marshfield it was the establishment clause. So once they had taken enough steps to get out of the business of establishment, they are no longer in violation of the establishment clause. But right up until they did that in the City of Marshfield case, the Seventh Circuit held that they were in violation of the establishment clause.

Whether that same holding would be applicable in this free speech case, I'm not so sure. Here Summum comes in when the city, it appears to me from the facts that are undisputed, was making attempts to rid itself of this monument. I found in my written opinion that it was not constitutionally adequate for me not to consider granting some kind of injunctive relief. But I'm not, as I say that, satisfied, and as I sit here and I have read especially Mr. White's and Mr. Manion's motion for summary judgment, and it seems to touch on this, but they also seem to maybe be rearguing Callaghan and the City of Ogden which we can't do. They seem to think that ownership alone is the key to whether a city is involved with an improper private expression opportunity. I don't think so. I think the question is whether the city is endorsing it or being involved with it to the point that another private actor should be entitled to the same opportunity. That was clearly the case in Callaghan and City of Ogden because one private actor was being [22] given that

opportunity. The Tenth Circuit certainly didn't say, well, because the City of Salt Lake saw a distinction between Summum and the Fraternal Order of Eagles which gave us the Ten Commandments monolith, then it is okay. It is just a different actor. That wasn't their analysis.

If I do get further briefing, it needs to be focused clearly on the binding precedents before this Court which is Callaghan and City of Ogden. The defendants would be obligated to point out to me why when the Lion's Club situation was in place it was not a violation of Summum's free speech rights. And the reason that presents practical possibilities in my mind is because, as a practical matter, what exactly was it that Summum was being robbed of in that particular scenario? Did they rally think the city would say, oh, because we have not maybe distanced ourselves far enough to satisfy Judge Benson in his analysis of possibly exercising his equitable powers, that we are at the same time violating Summum's free speech rights when we are doing everything that we can, and maybe it is as good or not as it could be done, but to get out of this business. So Summum comes along at a time when conceptually it may be difficult to say that their free speech rights were being violated.

But, on the other hand, if you take Callaghan and the City of Ogden and match them up against the situation, and which I am on record as saying there was not a sufficient [23] distancing to satisfy my view of what the constitution would require for a permanent solution, and that was based, as I said earlier, on this simple test, that would a reasonable person passing by that parcel believe the city was endorsing that private speech? In looking at it that way, Mr. Barnard wins

and it is maybe a technical prevailing but it is prevailing. Free speech rights were violated, no matter how nominally and no matter how technically. I believe it is fair to say that that is where I have been in the past, having not really contemplated the difference between the establishment clause and the free speech clause.

I have talked way too long, but I can say that with the present briefing I feel that that issue has been sufficiently brought to a head to where I feel comfortable in ruling. I'll invite any comments you all want to make.

By the way, one other thing. I want to emphasize that point about nominal. I am extremely inclined to find only nominal damages, if I do find in Mr. Barnard's favor, a very technical and very narrow window violation of Summum's rights. They didn't get involved until after the property had been transferred to the Lion's Club. I am inclined at the present time to exercise my discretion with respect to the award of attorney's fees consistent with recognizing that it is not just nominal in the sense of one dollar or twenty dollars, but that it does not carry also with it the entitlement to receive a [24] great measure of attorney's fees. I say that in an effort that it might help you to sit down and settle this.

I think if I'm going to rule on that question that is mixed up in your other pending motion, and I think you're very good lawyers, and I am especially probably moved by the fact that I have Mr. White and Mr. Manion on the other side, and they have briefed it so much more thoroughly than you have at this point, I think, but I don't know that they have hit on all the right points. I think I'm going to ask for more briefing

unless you talk me out of it. Mr. Barnard is always pretty good in doing that. He has a better track record than about any lawyer that appears before me of talking me out of things.

* * *

[33]* * *

THE COURT: Well, I am not going to ask for further briefing. I guess Mr. Barnard did talk me out of it. The reason I guess I'm not agreeing with Mr. White is because I find Callaghan and the City of Ogden controlling, and based on those cases, find a violation of Summum's free speech rights during that narrow period of time that the city attempted to get out of the business of sponsoring a private actor's free speech opportunity when it sold the property to the Lion's Club. Because the plaintiff has not proven to me by a preponderance of the evidence that there was no sale, I can't find that there was anything but a sale. The reason I'm finding Callaghan and the City of Ogden controlling is because [34] of my previous order, and the Court's position still is that the city did not do enough to remove the city's imprimatur on that parcel of land. Simply recording a quitclaim deed in the city recorder's office in this Court's view was not enough. It is a little like an alter ego theory, to borrow a legal analogy, where somebody is facing chapter seven bankruptcy and puts his car in his wife's name. There are a lot of times when legal ownership may have validly transferred, but it does not mean that there still won't be repercussions that flow from the fact that it was not transferred as validly as it should have been, which was the reason for this Court's staying with this case as long as it did.

I thought there may be a distinction between the

City of Marshfield and this case. As I sit here I am not sure, and frankly I don't think it is worth it. This case is not going to have precedents for very many situations, unless you have a city routinely with the mayor being also the president of the Lion's Club and in an effort to get out of the Ten Commandant site on city property doing a quitclaim deed and nothing else, no signage, no public announcement or anything else.

I suppose pragmatism is entering in here. I am granting Mr. Barnard's motion for declaratory relief and finding nominal damages in the amount prayed for of $20. That leaves open the question of attorney's fees. I guess I need briefing on that.

[35] You have not finalized that motion, have you?

MR. BARNARD: We have not made that motion. I would be happy to do so.

THE COURT: I think that moves this case along, frankly. I don't know that it would be worth your – well, I am sure anything would be worth the time, but I am finding that the standing issue was previously abandoned by the city and then later the attempt to revive it after this Court had already entertained the case on its merits, and if the circuit wants to look at standing I guess they can. I'm quite inclined to find standing where they took the steps to actually write a letter to the city, and there has been no proof that Summum was not ready, willing and able to install its monument on city owned property or property deeded to it by the city. I think under the First Amendment standing cases that I read back when I was quite interested in it, it appeared to me that that was enough. It is an area where I think the courts are going to be giving quite a lot of latitude to plaintiffs. I don't think a simple reading about it in the newspaper and

then filing a federal court action would be enough, but they did more here. They actually took the steps to communicate with the city and seek the expression of their own free speech rights, to which they received a response, and from which sprang their complaint. I'm also being a little pragmatic there.

So for both of those reasons, for the lateness of it [36] being renewed as a legal proposition and in light of the rather tortured history in this case, and because I am finding on the merits that the plaintiffs have standing, I'll rule in favor of the plaintiffs on the standing issue.

APPENDIX D

SUMMUM VS. DUCHESNE CITY,
Case No. 2:03-CV-1049DB
United States District Court, District of Utah,
Central Division
Docket Report, 04/28/2005, Doc. 112

Minute Entry for proceedings held before Judge Dee Benson: Argument heard on pending motions. The Court denies Dft?s motion for summary judgment for lack of standing. The Court denies Pla?s motion to strike affidavits. The Court grants Dft?s motion to amend order as to Dft?s first two requests. The Court rules that Dfts violated pla?s constitutional rights. Counsel are to submit briefing regarding attorney fees. entered 76 Motion for Extension of Time, entered 83 Motion to Amend/Correct, granting in part and denying in part 86 Motion to Amend/Correct, entered 99 Motion to Amend/Correct, denying 101 Motion to Strike, Motion Hearing held on 4/28/2005 re 76 Motion for Extension of Time filed by Duchesne City,, Clinton Park,, Yordys Nelson,, Nancy Wager,, Paul Tanner,, Darwin McKee,, Jeannie Mecham,, 99 Motion to Amend/Correct filed by Duchesne City,, Clinton Park,, Yordys Nelson,, Nancy Wager,, Paul Tanner,, Darwin McKee,, Jeannie Mecham,, 83 Motion to Amend/Correct filed by Summum,, 101 Motion to Strike filed by Summum,, 86 Motion to Amend/Correct filed by Duchesne City,, Clinton Park,, Yordys Nelson,, Nancy Wager,, Paul Tanner,, Darwin McKee,, Jeannie Mecham,. Attorney for Plaintiff: Brain Barnard, Attorney for Defendant Francis Manion and Ed White. (Court Reporter Ed Young) (reb,) (Entered: 05/17/2005)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

SUMMUM,
Plaintiff,
vs.
DUCHESNE CITY, et al.,
Defendants,

Case No. 2:03cv1049

Judge Dee Benson

ORDER

The above captioned matter came before the Court for hearing on April 28, 2005, the Hon. Dee Benson, United States District Court Judge presiding, the Plaintiff appearing by and through counsel, Brian M. Barnard, of the Utah Legal Clinic, the Defendants appearing by and through counsel, Edward L. White, III (appearing pro hac vice), of the St Thomas More Law Center, and Francis J. Manion (appearing pro hac vice), of the American Center for Law and Justice. The Court, having reviewed the parties' briefing and having heard the parties' arguments, issues the following order.

1. Plaintiff's Motion for Summary Judgment Re: Declaratory relief and Damages (Doc. #91) is GRANTED in accordance with *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. Ogden*,

297 F.3d 995 (10th Cir. 2002).

2. Defendants' Motion for Summary Judgment on Money Damages and Attorney Fees (Doc #88) is DENIED.

3. Defendants' Motion for Summary Judgment Re: Standing (Doc. #51) is DENIED.

4. Plaintiff's Motion to Strike Portions of affidavits (Doc. #101) is DENIED.

5. Defendants' Motion to Correct Docket Entry # 94 (Doc. # 99) is GRANTED as to paragraphs one and two of the motion. The motion is DENIED as to paragraph three.

6. SUMMUM is awarded $20.00 nominal damages. SUMMUM is also awarded attorney fees, the amount of which will be determined later based on a submission by the Plaintiff and a response by the Defendants. The award shall be limited to an amount consistent with the technical nature of the Defendants' violation as found by the Court.

IT IS ORDERED

DATED this 26th day of May, 2005.

/s/_____
Dee Benson
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

SUMMUM, a corporate sole and church

Plaintiff,

vs. Case No. 2:03CV0149

DUCHESNE CITY, et al., Judge Dee Benson

Defendants.

Before the Court is Plaintiff Summum's Motion to Set Attorney Fees. On May 26, 2005, the Court issued an Order awarding Plaintiff $20.00 nominal damages and attorney fees. The Order stated that the amount of the attorney fees would be determined later "based on a submission by the Plaintiff and a response by the Defendants." The Order further stated that the attorney fees would be limited "to an amount consistent with the technical nature of the Defendants' violation as found by the Court."

Plaintiff and Defendants have now briefed the issue and request a decision from the Court. Plaintiff argues that it is entitled to a full award of attorney fees, while Defendants argue that Plaintiff is entitled to either no fees, or a low fee award. For the reasons

set forth below, the Court finds that Plaintiff is entitled to a low fee award.

ANALYSIS

The background for this case can be found in the Court's Second Amended Opinion and Order, dated May 20, 2005. Having achieved a nominal victory, Plaintiff now argues that it is entitled under 42 U.S.C. § 1983 to an award of $69,444.00, which represents its full amount of attorney fees for this litigation.

The Civil Rights Attorney's Fees Awards Act states that "in any action or proceeding to enforce a provision of section . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. The United States Supreme Court has held that "a plaintiff who wins nominal damages is a prevailing party under § 1983." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). Plaintiff is thus eligible for an award of attorney fees, and the Court recognized as much in its May 26, 2005 Order. The task now before the Court is to determine what amount of an award is "reasonable." 42 U.S.C. § 1988. The Court's discretion is used to make this determination. *Id.*

Plaintiff and Defendant point out that courts have differed in what constitutes a reasonable award in a nominal damages case. The Supreme Court has identified three factors that courts consider in making this determination: (1) the difference between the amount sought and the damages recovered; (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) the accomplishment of a public goal other than occupying the time and

energy of counsel, court, and client. *Farrar*, 506 U.S. at 114-16; *id.* at 116-22, (O'Connor, J., concurring); *Barber v. Williamson*, 254 F.3d 1223, 1229-33 (10th Cir. 2001).

> No one factor is necessarily controlling; nor should all three factors necessarily be given equal weight. The bottom line is that all three factors should be given due consideration, but ultimately it is within the discretion of the . . . district court to determine what constitutes a reasonable fee given the particular circumstances.

Barber, 254 F.3d at 1233.

Under the first factor, the Court considers the difference between the amount sought and the damages recovered. In this case, Plaintiff originally sought general, special, and punitive damages "in the sum of at least one dollar ($1.00) each but in a larger and appropriate sum as to be determined at trial." Plaintiff later waived "all damages in excess of $20.00." The Court awarded Plaintiff nominal damages in the amount of $20.00. Thus, in terms of monetary damages, Plaintiff received what it sought. Plaintiff did not receive, however, the specific injunctive and equitable relief it demanded. Namely, Plaintiff wanted to be granted a plot of land and be allowed to erect its monument of seven aphorisms.

Under the second factor, the Court considers the significance of the legal issue on which the plaintiff claims to have prevailed. The Tenth Circuit has interpreted this factor as requiring a consideration of a plaintiff's "success as opposed to the importance of the legal issue . . . ." *Barber*, 254 F.3d at 1231. "In this circuit, the second factor . . . goes beyond the actual relief awarded [which is the focus of the first factor] to

examine the extent to which the plaintiff succeeded on [his] theory of liability." *Id.* (citation and quotation omitted) (alterations in original). In this case, Plaintiff succeeding in showing a technical violation by Defendants. Plaintiff did not succeed, however, in having the offending monument removed from the area, or in having its own monument erected.

Under the third factor, the Court considers whether the litigation accomplished a public goal. Relevant considerations include whether the plaintiff's victory will encourage attorneys to represent civil rights litigants, whether the victory affirms an important right, whether the violation was egregious, whether the victory will deter future lawless conduct, and whether the lawsuit set important precedent. *Id.* at 1231-32. This factor "should not be construed too liberally." *Id.* at 1233. While the free expression rights at underlying Plaintiff's claims are important, the Court finds that this lawsuit did not accomplish a significant furthering of those rights. This case did not halt egregious violations or set important precedent.

In addition to the three factors just discussed, the Court is also mindful of the *Farrar* court's statements regarding attorney fee awards in nominal damages cases. According to *Farrar*, "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Farrar*, 506 U.S. at 115. A plaintiff receiving only nominal damages is often such a prevailing party. *Id.* This is because "damages awarded in a § 1983 action must always be designed to *compensate injuries* caused by the [constitutional] deprivation." *Id.* (citations and quotations omitted) (alteration and emphasis in original). Thus, for a plaintiff recovering only nominal

damages, "the only reasonable fee is usually no fee at all." *Id.* In addition, "fee awards under § 1988 were never intended to produce windfalls to attorneys." *Id.* (citation and quotation omitted).

CONCLUSION

Given the above analysis, the particular circumstances of the case, and the overall de minimus victory of Plaintiff, the Court finds that a low fee award is reasonable in this case. Accordingly, the court sets the attorney fee award for this case at $694.40.

IT IS SO ORDERED.

Dated this 16th day of Sept. 2005

By the Court

/s/_____
Dee Benson
Chief Judge
United States District Court

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant/
Cross-Appellee,

v. No. 06-4057

DUCHESNE CITY, a governmental entity, et al.,

Defendants - Appellees/
Cross-Appellants.

SUMMUM, a corporate sole and church,

Plaintiff - Appellant,

v. Nos. 05-4152, 05-4168, 05-4272 & 05-4282

PLEASANT GROVE CITY, municipal corporation, et al.,

Defendants - Appellees.

ORDER
Filed September 5, 2007

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **KANE**,* District Judge.

This matter is before the court on the Defendants' motions to stay the issuance of the mandates in the above captioned appeals. The motions are granted

Entered for the Court,

/s/_____
ELISABETH A. SHUMAKER
Clerk

*Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

APPENDIX H

No. 06-4057, Nos. 05-4162, 05-4168, 05-4272 & 05-4282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant,

v.

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator, Defendants-Appellees.

and

SUMMUM, a corporate sole and church, Plaintiff-Appellant/Cross-Appellee,

v.

DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city

council members, Defendants-Appellees-Cross-Appellants.

August 24, 2007, Filed

ORDER

Before TACHA, Chief Judge, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

These matters are before the court on two separate petitions for rehearing, both with en banc suggestions, filed by the appellees. The petitions were filed separately and correspond to the two opinions issued in these appeals on April 17, 2007.

The requests for panel rehearing are denied by the original panel which decided these cases.

The en banc petitions were transmitted to all of the judges of the court who are in regular active service. A poll was requested. Through an equally divided vote, the decisions of the panel will stand. *See* Fed. R. App. P. 35(a); 10th Cir. R. 35.5 (noting that a majority of the active judges of the court may order rehearing en banc). Accordingly, the en banc requests are denied. Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant rehearing en banc. Judges Lucero and McConnell have filed dissents to the denial. They are attached and incorporated in this order. Judge Gorsuch has joined in Judge McConnell's dissent. Judge Tacha, writing separately, has responded. That response is also incorporated in this order.

LUCERO, J., dissenting from denial of rehearing en banc.

Because the panel's opinion will leave our circuit unnecessarily entangled in future review of time, place, and manner restrictions, and because in my judgment the panel's opinion incorrectly decides the question of the nature of the forum involved in cases of this type, I respectfully dissent from the denial of rehearing en banc. Conceptually, it is important to distinguish between transitory and permanent speech. As I see it, not unlike most public parks in America in which permanent monuments have been placed, the cases before us involve limited public fora. In limited public fora, local governments may make content-based determinations about what monuments to allow in such space, but may not discriminate as to viewpoint.

As an initial matter, I agree with the panel that these monuments do not constitute government speech. Under the *Wells* framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. *Wells v. City & County of Denver*, 257 F.3d 1132, 1141-43 (10th Cir. 2001) (holding sign was government speech where the city had "complete control over the sign's construction, message, and placement"; the city "built, paid for, and erected the sign"; and corporate sponsors did not "exercise[] any editorial control over its design or content."). In these cases, the private parties conceived the message and design of the monuments without any government input, thus the speech must be considered private. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-06 (10th Cir. 2002) (holding monument was not

government speech where Fraternal Order of Eagles "designed, produced, and donated the Ten Commandments Monument"; central purpose of monument was "to promote the views and agenda of the Eagles rather than the City of Ogden"; "Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product"; and city only claimed to adopt views of monument "post hoc"). It follows that these cases necessarily implicate government regulation of private speech.[1]

Whether government regulation of private speech violates the First Amendment depends on context. Courts engage in forum analysis to determine whether the speaker acts in a traditional public forum, a designated public forum, or a nonpublic forum, and it is in this analysis that I differ with the panel. In identifying the type of forum involved, we first consider the government property at issue and the type of access sought. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *City of Ogden*, 297 F.3d at 1001. Only after the type of forum is identified do we ask whether it is public or nonpublic in nature. Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007); *Summum v. Duchesne City*, 482

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[1]Although the monument involves a religious message, these cases properly consider the question of free speech, not establishment of religion.

F.3d 1263, 1269 n.1 (10th Cir. 2007). In the next step of the forum analysis, however, the panel asserts that the relevant forum is the entire park, regardless of the type of access sought. *Pleasant Grove*, 483 F.3d at 1050; *Duchesne*, 482 F.3d at 1269. The panel's claim that access "is relevant in defining the forum, but . . . does not determine the *nature* of that forum," *id.* at 1269 n.1, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum. *See Cornelius*, 473 U.S. at 801. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a case which the panel cites, the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora. 460 U.S. 37, 49 (1983). *Perry* also held that a court may make conceptual distinctions in defining the forum, even if there are no physical barriers. *See Cornelius*, 473 U.S. at 801 ("*Perry* . . . examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situs.") (citation omitted). As in *Perry* and *Cornelius*, Summum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are "quintessential public forums," *see Perry*, 460 U.S. at 45, but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. In *Perry*, the Court noted that parks are "places which by *long*

tradition or by government fiat have been devoted to *assembly and debate*," and "which have *immemorially* been held in trust for the use of the public, and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quotation omitted) (emphasis added). As *Perry* indicates, our modern concept of the park as a public forum derives from a well-established common law right to assemble and speak one's mind in the commons. This right, however, does not extend to the type of displays at issue here, and one would be hard pressed to find a "long tradition" of allowing people to permanently occupy public space with any manner of monuments. In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City's Central Park.

I recognize that there is some disagreement among our sister circuits on this point, but courts consistently have given special consideration to the issue of displays installed on public land. In *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993), the Seventh Circuit held that "[t]here is no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." (quotation and citation omitted). The Second Circuit in *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), determined that the city "had not created a forum in City Hall Park open to

the unattended, solitary display of religious symbols." By stating that the City of Burlington must affirmatively open the public park for this kind of use, the Second Circuit recognized that such physical occupation of park space does not fall within the scope of the traditional public forum, but rather the government must assent to such access before a forum is created. By contrast, the Ninth Circuit has held that "[n]o affirmative government action is required to open a traditional public forum to a specific type of expressive activity." *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993). *Kreisner* acknowledged, however, that the government might close the park with respect to large unattended displays, but held that the plaintiff had failed to meet his burden of proof on this point. *Id.* This is to say, that even the *Kreisner* court has recognized that it is not a foregone conclusion that parks are traditional public fora for all uses, particularly for the installation of permanent displays.

In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (in a limited public forum, the state may restrict speech but many not discriminate on the basis of viewpoint (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius*, 473 U.S. at 806)); *City*

of Ogden, 297 F.3d at 1002 n.4 ("A 'limited public forum' is a subset of the nonpublic forum classification."); *Callaghan*, 130 F.3d at 914 ("In more recent cases . . . the Court has used the term 'limited public forum' to describe a type of nonpublic forum"); *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 382 n.3 (4th Cir. 2006) (surveying conflicting views among the circuits). In the present cases, the city governments have not allowed the kind of "general access" or "indiscriminate use" of park property that is a hallmark of a designated public forum. *Summum v. Callaghan*, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (*citing Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 47). Instead, they have "create[d] a channel for a specific or limited type of expression where one did not previously exist," *Child Evangelism Fellowship*, 457 F.3d at 382, and have thus established limited public fora. As discussed *supra*, the right to install permanent monuments did not previously exist in these parks, and in these cases the cities have allowed only "selective access to some speakers or some types of speech in a nonpublic forum." *Callaghan*, 130 F.3d at 916. Here, the cities have permitted a few monuments to be erected for specific purposes -- in the case of Pleasant Grove, to memorialize the city's history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks.[2] *Cornelius*, 473 U.S. at 806.

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[2]By contrast, when the government itself speaks, it may discriminate as to both content and viewpoint. *Rosenberger*, 515

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. More importantly, however, the panel has given an unnatural reading to the traditional public forum doctrine, and binds the hands of local governments as they shape the permanent character of their public spaces. Although these governments may enact time, place, and manner restrictions that will give them some control over monuments in their parks, they now must proceed on the basis of the panel's faulty legal reasoning. More troubling is that such restrictions will undoubtedly be challenged in court and reviewed under a strict scrutiny standard. The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

U.S. at 833.

McCONNELL, J., joined by GORSUCH, J., dissenting from denial of rehearing en banc.

These opinions hold that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. *See Summum v. Duchesne City*, 482 F.3d 1263, 1274 (10th Cir. 2007) (a "constitutional right exists to erect a permanent structure on public property . . . when the government allows some groups to erect permanent displays, but denies other groups the same privilege"); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1054 (10th Cir. 2007) (the city "could ban all permanent displays of an expressive nature by private individuals" but may not exclude a monument based on its content unless the restriction serves "compelling" interests and is "narrowly tailored to achieve its stated interests"). This means that Central Park in New York, which contains the privately donated Alice in Wonderland statute, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

Significantly, the religious nature of the donated

monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge). These cases happen to involve Ten Commandments monuments, but it could work the other way. A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

With all due respect to the panel, this conclusion is unsupported by Supreme Court precedent. None of the cases cited supports this proposition. By tradition and precedent, city parks -- as "traditional public forums" -- must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. By their policies or actions, governments may create designated public forums with respect to fixed monuments, but -- contrary to these opinions -- the mere status of the property as a park does not make it so.

It is plain that the cities in these cases did not create designated public forums for the erection of permanent monuments in their parks. In the *Duchesne* case, the Ten Commandments monument is apparently the only fixed monument in the park. In *Pleasant Grove*, the other permanent structures and monuments "relate to or commemorate Pleasant Grove's pioneer history." 483 F.3d at 1047. In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in

these parks. It follows that any messages conveyed by the monuments they have chosen to display are "government speech," and there is no "public forum" for uninhibited private expression.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech. *Id.* at 692 (calling the monument "Texas' display"). Various courts of appeals have reached the same conclusion on similar facts. *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778, 774 (8th Cir. 2005) (Eagles monument "installed . . . by the City" and counted as "City's display"); *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (Eagles monument belonged to the state); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (donated Eagles monument constituted state speech in violation of the Establishment Clause); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001) (city's acceptance of donated Ten Commandments monument constituted state action in violation of the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (city's display of Ten Commandments monument was state action violating Establishment Clause). *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399-400 (3d Cir. 2004) (bronze plaque of Ten Commandments donated by private party and affixed to courthouse wall constituted government speech).

Our own leading precedent on government speech confirms these holdings.[1] *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), involved a temporary holiday display, which was on municipal property and co-sponsored by the city and private businesses; the display included a large sign on city property thanking private donors for their contributions to the city's holiday display. The Court concluded that the message conveyed by this sign was government speech. The city, we reasoned, chose to erect the sign for its own purposes, the city controlled the content of the sign, and it determined when, where, and how the sign would be displayed. 257 F.3d at 1141-42. *Wells* employed a four-part analysis derived from the Eight Circuit's *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), which involved the asserted right of the Missouri KKK to sponsor a segment of All Things Considered on National Public Radio.[2] In both *Wells*

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[1]To the extent *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), teach the contrary, they should be overruled.

[2]The factors were:

> (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan.

and *Knights*, the governmental or private character of the speech was in doubt because "ownership" could not be clearly established. Did the holiday decor belong to the city or to the private donors in *Wells*? Did the sponsorship message written by the KKK belong to that organization or to the public employee who broadcast it statewide on a state radio station?

The instant cases are easier than *Wells*, because ownership of the "speech" in these cases is clear: the Ten Commandments monument in *Duchesne* was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in *Pleasant Grove* was donated by the Fraternal Order or Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the *Wells* test would nonetheless be dispositive: The cities exercised total "control" over the monuments, 257 F.3d at 1141, and they bore "ultimate responsibility" for the monuments' contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, remade them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that -- sell the monument along with the plot of land on which it sits. See 482 F.3d at 1266-67.[3] *Cf. Serra v. U.S. General*

Wells, 257 F.3d at 1141 (quoting *Knights of the Ku Klux Klan*, 203 F.3d at 1093-94).

[3]Indeed, the panel held that Duchesne's attempted sale of the monument is controlled by state law governing the disposition of "public property." *Duchesne*, 482 F.3d at 1272.

Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork).

The only difference from *Wells* is that in the *Summum* cases, the cities did not design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. When they accepted donation of the monuments and displayed them on public land, the cities embraced the messages as their own. Similarly, Duchesne and Pleasant Grove controlled the placement of the statues, just as in *Wells* Denver bore "ultimate responsibility for the content of the display." 257 F.3d at 1142.

Once we recognize that the monuments constitute government speech, it becomes clear that the panel's forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's "own speech . . . is controlled by different principles." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Specifically, "when the State is the speaker, it may make content-based choices." *Id.* at 833. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause -- and need not alter its speech to accommodate the views of private parties. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) ("Simply

because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist.") In other words, just because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing.

Other circuits have reached this conclusion in similar cases. *See Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) ("even in a public forum there is no constitutional right to erect a structure"); *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("We are not cognizant of . . . any private constitutional right to erect a structure on private property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.").

This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. Their validity would depend on details of their context and history, in accordance with the Supreme Court's recent decisions in *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005). We have no occasion here to speculate on the outcome of any such litigation.

The panels' decisions in these cases, however, are incorrect as a matter of doctrine and troublesome as a matter of practice. I realize that en banc proceedings are a major investment of time and judicial resources, and that we cannot en banc every case that errs. But the error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decisions should be corrected.

TACHA, J., response to dissent from denial of rehearing en banc.

Throughout my judicial career, I have been loath to write separately because I firmly believe that an intermediate court of appeals should speak with as much clarity and consensus as possible. I reluctantly take the unprecedented step of responding to the dissents from the denial of rehearing en banc because, left unanswered, the dissents could lead a reader to conclude that these cases present unresolved issues that are properly raised and appropriately addressed on these facts. In particular, I write to emphasize that these cases do not raise novel or unsettled questions regarding government speech. Nor do the panel decisions suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium. Rather, the decisions follow well-established First Amendment precedent requiring that cities regulate private speech in public forums equally.

Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we apply?

As Supreme Court precedent makes clear, the type

of speech does not, and should not, determine the nature of the forum. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city's restriction on *permanent* commercial newsracks on *public sidewalks* (a public forum) was an impermissible content-based restriction on speech). If a city wishes to regulate the number of permanent private displays in a public forum, it may do so through reasonable content-neutral regulations governing the time, manner, or place of such speech. *See id.* at 429-30 ("It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral."); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (noting that a reasonable content-neutral ban on all unattended private displays in public forum would likely be constitutional, but a regulation based on content must be "necessary, and narrowly drawn, to serve a compelling state interest").[1]

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[1]Contrary to Judge Lucero's dissent, the description of the forum as "permanent monuments in a city park" does not change the nature of the forum from a traditional public forum to some kind of limited or nonpublic forum. To focus solely on the monuments (i.e., the form of speech) and ignore the underlying property would be a distortion of Supreme Court precedent, as explained above. Furthermore, the conclusion that permanent speech is more limited than transitory speech defies logic. Like temporary signs and demonstrations, permanent displays most certainly encompass the government property; indeed, permanent monuments are physically attached to and always present on the property. Unlike the speaker in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), who sought access to teachers' mailboxes, Summum did not seek access to "a forum within the confines of the government property," *Cornelius v.*

Judge McConnell's dissent would have us ignore these well-established forum principles when the government does not "by word or deed" create a designated public forum for permanent private expression. Dissent at 3. In this view, if the government has not created a designated public forum, its acceptance alone turns private speech into government speech. More important, under this approach, government acceptance of the physical *medium* of speech, not the message, is sufficient. This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985); rather, it sought permanent access to the physical property itself. Thus, although the relevant forum in these cases is "permanent monuments in a city park," the access sought is not the kind of limited access that allows for a more narrow definition of the forum. This is true even if we accept the view that a speaker does not have a constitutional right to erect a permanent display in a public forum. Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.

Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court cases recognizing the government's ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and patron of the arts). We note this distinction in both opinions. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269 n.2 (10th Cir. 2007).[2] In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park. We cannot, however, extend the reasoning of these Supreme Court decisions to allow the government to make content-based decisions concerning *all* permanent private speech in a public forum. As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.

In short, the government does not speak just

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[2]We cite the following Supreme Court cases in both opinions: *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs may consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (recognizing that broadcasters must "exercise substantial editorial discretion in the selection and presentation of their programming"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may consider content in awarding grants as such judgments "are a consequence of the nature of arts funding"). *See Pleasant Grove City*, 483 F.3d at 1052 n.4; *Duchesne City*, 482 F.3d at 1269 n.2.

because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, the appropriate inquiry is whether the government controls the content of the speech at issue, that is, whether the message is a government-crafted message. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560 (2005) (holding that beef advertising campaign constituted government speech because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government"). The four-factor approach to government speech that we adopted in *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-42 (10th Cir. 2001), reflects the Supreme Court's focus on whether the message is the government's own. But contrary to Judge McConnell's dissent, we said nothing in *Wells* that suggests our government speech inquiry turns on the ownership of the physical medium conveying the speech at issue.[3] Indeed, the second *Wells* factor cited by the dissent is not about controlling the physical medium of the speech, but about controlling the *content* of that speech. *See id.* at 1142 (finding that the city exercised editorial control over the content of the speech). A city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the

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[3]Moreover, contrary to Judge McConnell's dissent, *see* Dissent at 4, the city's ownership of the holiday display in *Wells* was clearly established. *Wells*, 257 F.3d at 1139 (noting that, as a factual matter, "Denver owns each component part of the display").

message to the political process, a result that would shield the government from First Amendment scrutiny and democratic accountability.

This is in fact the result that Judge McConnell's dissent advocates, and it is most apparent in the dissent's equation of government endorsement in the Establishment Clause context with government speech under the Free Speech Clause. Citing *Van Orden v. Perry*, 545 U.S. 677 (2005), the dissent emphasizes that the Supreme Court has characterized a Ten Commandments monument under analogous circumstances as a "state display" for purposes of the Establishment Clause. *See id.* at 692 (holding that "Texas' display of this monument" did not violate the Establishment Clause). The simplest response to this observation is that a state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own. *See Pleasant Grove City*, 483 F.3d at 1047 n.2 (explaining that the government may violate the Establishment Clause without directly speaking). *Van Orden* and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state *action* violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the

message that monument conveys into state speech.[4]

On a broader note, because the Establishment and Free Speech Clauses serve different purposes, discussions of state action in Establishment Clause cases are not germane to a determination of when the government speaks for purposes of the Free Speech Clause. Indeed, the Supreme Court has analyzed government speech differently in the context of free speech, recognizing the differing theoretical justifications underlying the Establishment and Free Speech Clauses. In the Establishment Clause context, government speech favoring or disfavoring religion is a concern because of the effect it may have on individual members of the political community: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Indeed, in deciding that a student-led "invocation" permitted by school policy could "not properly [be] characterized as 'private speech'" under the Establishment Clause, the Supreme Court focused explicitly on the message that government *sponsorship* sends members of the community: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the

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[4]In fact, one case cited in Judge McConnell's dissent contains language specifically rejecting this proposition. *Modrovich v. Allegheny County*, 385 F.3d 397, 410-11 (3d Cir. 2004) ("The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.").

audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation omitted). In other words, the government's sponsorship of religion sends an impermissible "ancillary message" that renders the speech not entirely private.

The same concerns do not underpin the Free Speech Clause. Although individuals may constitutionally challenge government sponsorship or endorsement of religion, they generally have no constitutional right to challenge government speech under the Free Speech Clause. In the free speech context, the fact that government speech is exempt from constitutional challenge is justified because it is subject to the political process:

> The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). That is, the latitude that government speech enjoys in the free speech context is justified by the "*political safeguards*" in the democratic process that set government speech

"apart from private messages." *Johanns*, 544 U.S. at 563 (emphasis added). Thus, its immunity from constitutional challenge under the Free Speech Clause does not depend on whether the "reasonable observer," familiar to Establishment Clause jurisprudence, would perceive the government as speaking.

Rather, if citizens object to the government's message, they may elect new representatives who "later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235. But in order for citizens to be able to hold the government accountable for its speech, the government must speak subject to "traditional political controls [that] ensure responsible government action." *Id.* at 229; *see also Johanns*, 544 U.S. at 560-64 (concluding that promotional program was subject to adequate safeguards because its message was prescribed by federal law and the government supervised and controlled the program and the contents of its message). The speech in these cases was not subject to political safeguards; the facts simply do not implicate government speech because the cities exercised no control over the content of the messages.

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly

contrary to established First Amendment principles. *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 795-96 (4th Cir. 2004) ("The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."). Because this approach to government speech is unsupported by Supreme Court precedent and the purposes of the First Amendment, this Court may not consider it. And because the relevant law and its application are clear, en banc consideration is inappropriate.

APPENDIX I

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

APPENDIX J

DUCHESNE CITY
ORDINANCE NO. 04-2

AN ORDINANCE ADDING SECTION 7-4-2 TO THE DUCHESNE CITY MUNICIPAL CODE REGARDING DISPOSAL OF PARCELS OF REAL PROPERTY AND DEFINING TERMS

WHEREAS, on June 29, 2004 the city council (the "Council") of the City of Duchesne (the "City) met in regular session to consider, among other things, adding Chapter 4-2, to Section 7 of the Duchesne Municipal Code regarding disposal of parcels of real property and defining terms; and

WHEREAS, in *Toone, et. al. v. Weber County*, et. al., 2002 UT 103 (2003) the court held that counties (applicable to municipalities by analysis) must submit proposed sales of real estate to their planning commission for review and recommendation or the sale is void; and

WHEREAS, H.B. 122, second substitute (codified in part as Utah Code Ann. § 10-8-2, as it applies to municipalities), eliminates the *Toone* requirement and requires that before a municipality may dispose of significant parcels of real property, the municipality shall provide reasonable notice of the proposed disposition and allow an opportunity for public comment. Further, it requires each municipality, by ordinance, to define what constitutes significant parcels of real property and reasonable notice; and

WHEREAS, the Council desires to comply with H.B. 122, second substitute, by adopting definitions of

"a significant parcel of real property," "reasonable notice," and helpful definition of "disposition"; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interest of the health, safety and welfare of the citizens of the City to add Chapter 4-2 to Section 7 to the Duchesne Municipal Code regarding disposal of parcels of real property," and defining terms.

NOW, THEREFORE, BE IT ORDAINED by the Council that the following be added as Section 7-4-2 of the Duchesne Municipal Code:

SECTION:

7-4-2: DISPOSAL OF PARCELS OF REAL PROPERTY

CHAPTER 4:

MUNICIPAL PROPERTY; USE AND CONTROL

SECTION:
7-4-2A Notice Required
7.4.2B Public Comment
7-4-2C Definitions

A. NOTICE REQUIRED: If the property that is declared surplus pursuant to section 7-4-2C is a significant parcel of real property as defined in this section, then the City shall provide reasonable notice, as defined below, of the proposed disposition at least 14 days before the proposed disposition, to provide the public an opportunity for comment on the proposed disposition.

B. PUBLIC COMMENT: If the City receives public comment on the proposed disposition, the City Recorder shall forward copies of such public comment to the city council. Thereafter, the city council may rescind its declaration of surplus property, direct the mayor to proceed with the sale, or impose such additional terms and conditions as the city council may adopt.

If the City does not receive public comment on the proposed disposition, the mayor may proceed with the sale after satisfying all of the other terms and conditions applicable to the disposition.

C. DEFINITIONS: For purposes of this section, "disposition" shall mean to transfer control of city owned property to another by any means including, but not limited to, sale, lease or other type of conveyance of such property.

1. For purposes of this section "reasonable notice" shall mean posting notice of the proposed disposition in at least three public places within the city and publishing notice of the proposed disposition in a newspaper of general circulation in the city.

2. For purposes of this section, "significant parcel of real property" shall mean a parcel of real property owned by the city with a reasonable value equal to or greater than $100,000 or reasonable yearly rental value equal to or greater than $15,000.

If any provision of this Ordinance is held by a court of competent jurisdiction to be unconstitutional or for any reason invalid, such ruling or decision shall not affect the validity of the remaining provisions, which are adopted separately and independently and shall remain in full force and effect.

This Ordinance, assigned Ordinance No. 04-2 shall

take effect as soon as it shall be published or posted as required by law, deposited and recorded in the office of the City Recorder, and accepted as required herein.

PASSED AND APPROVED this 29th day of June, 2004.

/s/_____
Clinton Park, Mayor

ATTEST:

/s/_____
Diane Miller, City Recorder

APPENDIX K

ORDINANCE NO. 04-4

An Ordinance of the Duchesne City Council,
Duchesne County, Utah
Vacating a Portion of Roy Park
and Providing an Effective Date

WHEREAS, in a portion of Roy Park there is currently displayed a certain stone monument donated to the City of Duchesne in loving memory of Irvin A. Cole by his wife, Leona Cole, and his daughters, Rae Donna, Lou Ann, and Ro Jean, which monument contains, among other things, a version of the Ten Commandments; and

WHEREAS, the presence of said monument has led to the filing of a lawsuit against the City which lawsuit claims that by the City's display of the Cole family's memorial, the City has created a public forum or limited public forum requiring the City to set aside portions of Roy Park for the display of memorials, monuments, and other donations from private individuals and organizations; and

WHEREAS, the City never intended to, did not, and does not wish to open Roy Park or any portions thereof as a forum for the display of memorials, monuments or other donations from private individuals and organizations; but

WHEREAS, the City does not wish to show disrespect or ingratitude to the Cole family, particularly in light of the many years of civic service rendered to our community by the late Irvin and Leona

Cole by removing the monument in question from the place it has occupied since 1979; and

WHEREAS, the City Council has determined that that portion of Roy Park on which the Cole monument stands is no longer needed for public purposes; and

WHEREAS, the City Council has determined that the sale of said portion of Roy Park will further the important public interests of terminating potentially costly litigation and avoiding future litigation by permanently closing Roy Park as a forum for such private displays;

NOW THEREFORE, Be It Ordained by the City Council of Duchesne, Duchesne County, Utah, as follows:

1. That the portion of Roy Park described in Exhibit "A" incorporated herein shall be vacated.

2. That the Mayor is authorized to execute all documents related to vacating the described portion of Roy Park and to the selling of same.

3. All ordinances, resolutions or policies in conflict herewith are repealed.

4. This ordinance shall take effect immediately upon passage.

PASSED this 29th day of June, 2004.

/s/_____
Clinton Park, Mayor

ATTEST:

/s/_____
Diane Miller, City Recorder

[Description of monument parcel omitted]

APPENDIX L

RESOLUTION No. 04-3

A Resolution of the Duchesne City Council,
Duchesne County, Utah
Authorizing the Mayor to Execute Quit Claim Deeds
to the
Portion of Roy Park Which was Vacated by the City.

WHEREAS, the Duchesne City Council approved Ordinance No. 04-4, vacating a portion of Roy Park; and

WHEREAS, Section 10-8-1 Utah Code Annotated, 1953 (as amended) grants the city council the power to control the finances and property of the corporation; and

WHEREAS, Section 10-8-2 Utah Code Annotated, 1953 (as amended) grants the city council the power to purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the city; and

WHEREAS, it is necessary to dispose of certain parcels of real property as a result of the vacation of a portion of a public park; and

WHEREAS, the Duchesne City Council has determined that it is in the best interests of the citizens of the city to dispose of said property; and

NOW THEREFORE, Be It Resolved by the City Council of Duchesne, Duchesne County, Utah as follows:

1. The Mayor or his designee is hereby authorized

to execute Quit Claim Deeds in favor of Rae Donna Jones, Lou Ann Larson and RoJean Rowley for the subject property or properties more particularly described in the vacation plat attached as Exhibit "A" and incorporated herein.

THE RESOLUTION APPROVED and adopted this 29th day of June, 2004, by the City Council of Duchese, Duchesne County, Utah.

/s/ _____
Clinton Park, Mayor

ATTEST:

/s/_____
Diane Miller, City Recorder

[Description of monument parcel omitted]